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In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1394

CLINTON COMMUNITY HOSPITAL CORPORATION,
Petitioner

v.

SOUTHERN MARYLAND MEDICAL CENTER,
SECRETARY OF HEALTH, EDUCATION AND WELFARE,
SECRETARY OF HOUSING AND URBAN DEVELOPMENT
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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May 7, 1975

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The Petitioner Clinton Community Hospital Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 10, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. The opinion of the District Court of the United States for the District of Maryland, reported at 374 F. Supp. 450 (D. Md. 1974), also appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 10, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether Petitioner has standing to sue under the National Environmental Policy Act, 42 U.S.C. 4321; the Comprehensive Health Planning Act, 42 U.S.C. 246; The National Housing Act, 12 U.S.C. 1715 z-7; the Noise Control Act of 1972, 42 U.S.C. 4901-4917; and the Public Health Service Act, 42 U.S.C. 291 d(a)(1).

2. Whether the National Environmental Policy Act covers the situation where the major federal action is itself to be placed in a hostile or unfavorable environment.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42, Chapter 55. National Environmental Policy.

§*4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts*

The Congress authorizes and directs that, to the fullest extent possible:. . .(2) all agencies of the Federal Government Shall–

. . .(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–

(i) the environmental impact of the proposed action,

(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) and irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5 and shall accompany the proposal through the existing agency review processes.

STATEMENT OF THE CASE

Two groups are competing to build one hospital to serve the southern portion of Prince George's County, Maryland. Petitioner, Clinton Hospital, is an existing 33-bed hospital, while Respondent, Southern Maryland Medical Center ("SMMC") is a loose aggregation of doctors proposing to build a new hospital.

The competition centers principally over possession of the coveted "Certificate of Need." Without the Certificate of Need, no construction can take place because it is the touchstone that opens up Federal largess in the form of financing aids such as HUD mortgage insurance. Moreover, full reimbursement for capital expenditures under medicaid, medicare and maternal and child health programs will not be made without the Certificate of Need.

The Certificate of Need program has its origins in 42 U.S.C. 246, which enunciates a Federal program allocating funds to the states to cover the costs of administering state operated comprehensive health planning programs.

Unfortunately, Maryland, which has set up a Comprehensive Health Planning Agency and several areawide planning agencies, has developed neither a state nor areawide comprehensive health plan, although the statute has been in effect since July 1, 1970.

In April, 1971, the areawide health planning group for Prince George's County, denominated the Health Planning Advisory Committee for Prince George's County ("HPAC")

made a recommendation to the State Comprehensive Health Planning Agency ("CHP") that the coveted Certificate of Need be granted to the SMMC group and turned down Clinton Hospital's expansion plans.

Petitioner is an accredited proprietary hospital that has been in existence since 1959. During 1969 and early 1970 it made application to expand its facilities under statutory authority which preceded a new Maryland statute which became effective July 1, 1970.

In 1966, Congress had passed the Comprehensive Health Planning and Public Health Act Amendment of 1966 which encouraged States to develop new administrative machinery to engage in comprehensive health planning. In response to the federal invitation, Maryland adopted the appropriate enabling legislation summoning into existence the Maryland Comprehensive Health Planning Agency (CHP), which was the State-wide planning agency. The Health Planning and Advisory Committee of Prince George's County (HPAC), which had been organized in 1968, was specifically singled out by the Maryland Statute (Section 559 (a-1) of Article 43 of the Annotated Code of Maryland) as the area-wide health planning agency for that county.

With the adoption of Maryland's legislation and the creation of CHP, Respondent Southern Maryland (SMMC) applied for zoning to build a new two hundred bed hospital approximately two miles from Petitioner's facility.

The site chosen by SMMC consisted of approximately 26 acres located 17,000 feet due South of Runway 1-L of Andrews Air Force Base, at a site where an aircraft had crashed in 1954, killing a pregnant woman and two of her children. Her husband received third degree burns and died seven days later. Their house was also destroyed. The site is within the direct approach path, as well as within the "transitional" zone, although it is 2000 feet off the center line of the published approach and departure charts.

Although Petitioner opposed Respondent's request for a zoning deviance in hearing held in November 1970, SMMC did receive a special exception to build its proposed hospital at its chosen site. The attorney representing SMMC in the zoning hearings was also counsel for HPAC.

This occurred in the face of a document uncovered by Petitioner prepared in May 1965 entitled, "Hospital Studies for Prince George's County, Md.", prepared for the Board of County Commissioners by The Maryland National Capital Park

and Planning Commission (a Commission jointly funded by Prince George's and Montgomery Counties). This study contained the following statement on Page 10 thereof:

> "Another consideration (i.e. important specifically in the Andrews Air Force Base Area) is the fact that a hospital should not be located in airport approach zones."

SMMC was nevertheless granted a zoning exception.

In the meanwhile, the application that Petitioner had pending before the administrative agency (preceding the organization of CHP) was forwarded to CHP and a request was made of Petitioner to refile on forms that had been newly designed. Petitioner complied, after which hearings were called before the local area-wide agency, HPAC.

The result of the newly-created Maryland administrative machinery was that HPAC made recommendations to CHP that Petitioner's proposal to expand its existing facility be denied and that the SMMC group be permitted to expand. Several weeks thereafter, CHP endorsed the recommendation of HPAC. Petitioner subsequently appealed to the Board of Review, which in turn, upheld the decision of CHP. Petitioner then filed appeals and other actions in the Baltimore City Court.

Section 246 (a)(2)(C) of Title 42 compels the states to incorporate into their "plans" – "environmental considerations as they relate to public health." Maryland's environmental protection act only applies to the State legislature and not to its administrative agencies as is true of NEPA. One State agency, Environmental Protection Services, did make a "cursory review" of the SMMC application and advised CHP it found nothing objectionable. No on-site inspection or measurements were made, however, by that State agency.

During the administrative hearings before the Maryland administrative machinery, Petitioner had prepared several in-depth environmental studies clearly establishing, in Petitioner's opinion, that the SMMC site created potential dangers to the future patients by reason of life safety from approaching and departing aircraft, noise, electronic interference and other factors. Many of these findings were incorporated into a denunciatory report prepared by the Maryland Chief of Licensing and Enforcement under date of January 10, 1973. This report was issued, however, after completion of all administrative proceedings.

SMMC had also made application to HEW for purposes of obtaining a HUD mortgage guarantee. On October 24, 1972, SMMC received from HEW a feasibility approval letter for Respondent's application for an FHA insured mortgage. No inquiry whatsoever was made by HEW into environmental considerations relative to the SMMC mortgage guarantee proposal at this time. Subsequently, Petitioner was advised that HEW had made the determination that an environmental impact statement (EIS) would be required on the SMMC proposal and elicited from Petitioner copies of all its environmental studies. In December, 1973, instead of receiving an EIS, Petitioner received from HEW a Marginal Environmental Impact Statement (MEIS), with the explanation that HEW had subsequently made the determination that an EIS would not be required to be made on the SMMC proposal. There was attached to the MEIS as exhibits, various documents that had been supplied to HEW ostensibly by SMMC. There were no references whatsoever to any of the environmental materials developed by Petitioner, nor to the adverse report that had been prepared by the Chief of Division of Licensing and Enforcement with respect to the SMMC proposal, which in substance, had found the SMMC site to be unsuitable both from the standpoint of life safety and noise.

Petitioner has been advised by HEW that it has made an inquiry into the environmental aspects of the SMMC proposal. At no time, however, has it seen any hard evidence sustaining this contention. An examination of HEW's MEIS and HUD's Environmental Work Sheet clearly indicates that Petitioner's environmental data, developed at great expense, has either been ignored or deliberately overlooked. The result has been that SMMC received a second feasibility letter in June, 1974.

On October 3, 1973, Petitioner filed its initial complaint for Injunction against SMMC, seeking to enjoin the proposed construction of SMMC's new hospital. Jurisdiction was invoked under provisions of the National Environmental Policy Act (NEPA). After having been granted Leave to Amend its Complaint, Petitioner joined HEW and HUD as additional defendants. On April 16, 1974, the United States District Court for the District of Maryland dismissed Petitioner's Complaint. A copy of the opinion in that case is reproduced in the Appendix hereto.

Petitioner filed a timely appeal with the Fourth Circuit Court of Appeals, appealing the District Court's determination

that Petitioner did not have standing to invoke NEPA, and that Petitioner did not state a cause of action upon which relief could be granted under NEPA. Argument on this case was heard on January 8, 1975, and on February 10, 1975 the Fourth Circuit affirmed the District Court. The opinion in that case is set forth in the Appendix hereto. The Fourth Circuit affirmed the District Court's holding that Petitioner did not have standing under NEPA and that NEPA did not apply to the facts of this case.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS AS TO THE PROPER INTERPRETATION OF THE "ZONE OF INTERESTS" PART OF THE STANDING TEST, AND ALSO RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING EFFORTS TO OBTAIN STANDING TO SUE.

The Supreme Court, in the companion cases of *Association of Data Processing Services Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970) and *Barlow v. Collins*, 397 U.S. 159, 90 S. Ct. 832, 25 L. Ed. 2d 192 (1970) established a two-prong test for standing:

(1) "Injury in fact, economic or otherwise

. . .

(2) "Whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question (397 US at 153)."

Each of the lower courts in the instant case ruled that, since petitioner's "injury in fact" was economic, it did not have standing to sue under NEPA because this injury was not within the "zone of interest" to be protected or regulated by that statute.

Although nearly every court after *Data Processing* and *Barlow* has recognized the existence of the two-prong test for standing, the vague nature of the "zone of interest" test has resulted in courts reaching inconsistent results because they have interpreted this test with varying degrees of strictness.

Moreover, at least one Court of Appeals has specifically held that this test is not to be used in inquiring into a Plaintiff's standing to sue. *Sierra Club v Hickel* 433 F. 2d 24 (9th Cir. 1970) examined the two-prong test of *Data Processing* and

Barlow, and after dealing with the "injury in fact" aspect of the test, held that this test alone was sufficient to confer standing on plaintiffs. With regard to the "zone of interest" test, this court said:

> " The significance of the language is not entirely clear. It is likewise not made clear in a companion case decided the same day and involving the same question. We submit that it does not establish a test separate and apart from or in addition to the test which the Court first looked to in *Camp*.
>
> . . . . (The injury in fact test)
>
> " This is the test which can solve most if not all of the decided cases and also fit the standard of the Administrative Procedure Act."

In the very cases which established a two-prong standing test, Justices Brennan and White, in an opinion which concurred in the result but dissented in the reasoning, strenuously objected to the institution of the "zone of interest" test. Some of the comments made by the concurring opinion indicate the weakness of this test:

> "I submit that in making such examination of statutory materials an element in the determination of standing the Court not only performs a useless and unnecessary exercise but also encourages badly reasoned decisions, which may well deny justice in this complex field. When agency action is challenged, standing, reviewability, and the merits pose discrete and often complicated issues which can best be resolved by recognizing and treating them as such.
>
> . . . .
>
> " Today's decisions, however, will only compound present confusion and breed even more litigation over standing. In the first place, the Court's formulation of its non-constitutional element of standing is obscure. What precisely must a plaintiff do to establish that the 'interest sought to be protected. . .is arguably within the zone of interest to be protected or regulated by the statute'? How specific a 'interest' must be advanced? Will a broad, general claim, such as competitive interest suffice, or must he identify a specifically legally protected interest? When, too, is his interest 'arguably' within the appropriate 'zone'?

> Does a mere allegation that it falls there suffice? If more than an allegation is required, is the plaintiff required to argue the merits? And what is the distinction between a 'protected' and a 'regulated' interest? Is it possible that a plaintiff may challenge agency action under a statute that unquestionably regulates the interest at stake, but that expressly excludes the Plaintiff's class from among statutory beneficiaries? . . .
>
> " The Court's approach does too little to guard against the possibility that judges will use standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits (at 176-178)."

Another critic of this test is Professor Davis, who seriously questioned the interpretation which some courts have given this test and argues that the Supreme Court never intended the "zone of interest" test to have a life of its own. See Davis, *The Liberalized Law of Standing*, 37 UNIV. OF CHICAGO L. REV. (1970).

Davis argues convincingly that:

(1) The test is analytically faulty because by requiring Plaintiff's interest to arguably "be protected" or "be regulated", the Court ignores the interests of Plaintiffs who deserve common-law protection of their interests but who are not being protected or in fact regulated by the statute or constitutional guarantee in question.

(2) The test is contrary to much case law that the court could not have intended to overrule, such as cases which have granted standing without any apparent interest which was being protected by the statute in question.

(3) The test is unduly cumbersome, inconvenient, and artificial because to ascertain whether an asserted interest is to be protected or regulated by the statute an inquiry into the legislative history is required and this leads to decisions based upon fortuitous remarks and statements without authority made during the course of hearings and debates on legislation.

(4) The test is contrary to the congressional intent of the Administrative Procedure Act because the right of review under that act is conferred upon "any persons adversely affected in fact by agency action".

Professor Davis agrees with Justices Brennan and White that "injury in fact" should be the only test for standing.

When the *Sierra Club v. Hickel* came to the Supreme Court as *Sierra Club v. Morton,* 405 US 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972) the standing issue was decided upon other grounds and the court expressly refused to consider the "zone of interest" controversy raised by the *Hickel* case. The Court said in Footnote 5:

> " In deciding this case we do not reach any questions concerning the meaning of the 'zone of interests' tests or its possible application to the facts here presented."

Again, in a more recent case involving standing of Plaintiffs in an environmental law case, *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 US 669 (1973), the Court refused to deal with the "zone of interest" controversy. In Footnote 13, the Court said:

> " As in *Sierra Club,* it is unnecessary to reach any question concerning the scope of the 'zone of interest' test or its application to this case."

Obviously, the time has come for this Court to treat the "zone of interest" aspect of the standing problem definitively.

These conflicts and uncertainties justify the grant of certiorari to review the judgment below.

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS AS TO THE ISSUE OF WHETHER A PLAINTIFF ALLEGING ECONOMIC INJURY CAN SATISFY THE "INJURY IN FACT" PART OF THE STANDING TEST UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT, 42 USC § 4321, ET. SEQ.

The Fourth Circuit's opinion in this case also raises important statutory and policy considerations which arise from bona fide efforts to invoke the National Environmental Policy Act. The unanswered question is: Does a Paintiff have standing to sue under NEPA by alleging economic injury?

The Fourth Circuit, in reviewing Plaintiff's standing to sue under NEPA, followed the two cases of *Zlotnick v. Redevelopment Land Agency,* 2 Environmental Law Reporter (ELR) 20235 (D.C.D.C. 1972) and *Pizitz, Inc. v. Volpe,* 2 ELR 20378 (M.D. Ala. 1972) both of which had stated that Plaintiffs lacked standing to sue under NEPA because their only injury was economic and this interest was clearly not within the "zone

of interest" to be protected or regulated by NEPA.

However, two other District Court cases have held directly opposite views:

(1) *National Helium Corporation v. Morton*, 326 F. Supp. 151 (D. Kansas 1971) *aff'd*, 455 F. 2d 650 (10th Cir. 1971) expressly held that a corporate Plaintiff had standing to invoke NEPA, despite the fact that its only ascertainable injury was economic:

> " It may seem passing strange to see Plaintiffs, the offspring of corporate giants of the oil and gas industry, garbing themselves in the status of private Attorneys General for the public interest, yet this Court perceives no valid reason why they cannot assert this rule as protector of the public interest, along with their own. The Court finds that Plaintiffs do have requisite standing to maintain this action (326 F. Supp. at 157)."

(2) *Getty Oil Company (Eastern Operations) v. Ruckelshaus*, 342 F. Supp. 1006 (D. Dela. 1972) *rev'd on other grounds*, 467 F. 2d 349 (3rd Cir. 1972). The facts of this case were that the government had ruled that fuel was required to have less than 3.5 per cent sulfur content, and Plaintiffs Getty and Phillips Petroleum sued on the grounds that such regulations would cost Plaintiffs ten thousand dollars per day in the more expensive sulfur-free fuel.

Plaintiffs' standing was attacked and the Court held that Getty's high electricity costs resulting from Clean Air Regulations provided it with "position and economic stake" under the Clean Air Act and that its allegation of "inefficient utilization of natural resources" might bring its claim within the ambit of NEPA:

> " I have concluded that Plaintiff does have standing to bring this action. . .(342 F. Supp. at 1013)."

These conflicting lines of decision were recognized by Frederick Anderson in his book, *NEPA in the Courts*, published by Resources for the Future, Inc. (1973) in which he tried to reconcile these cases. Anderson states (at 39) that the *National Helium* case was decided "well before the spate of recent actions aimed at EPA" and he notes that some courts have become suspicious when private individuals or corporations have raised NEPA to obfuscate and delay Federal projects

aimed at actually protecting or improving the environment. However, this distinction does not adequately reconcile the differences between the *Getty* case and the *Zlotnick* and *Pizitz* cases since the proposed regulations calling for low sulfur content in the *Getty* case would appear to be federal action aimed at protecting or improving the environment; nor does it explain the instant case since this is not a situation where a private plaintiff seeks to delay or obfuscate a federal project aimed at protecting the applicable environment. Thus, the conflict of this case with that of *Getty* and *National Helium* is more complete. Petitioner respectfully submits that the time has come for the Court to resolve these differing interpretations of standing to sue under NEPA.

It is not entirely clear what the basis is for the *Zlotnick* and *Pizitz* cases' reasoning that a Plaintiff alleging economic injury did not meet the Supreme Court's standing test.

It was clear from *Data Processing* and *Barlow* that economic injury would satisfy the "injury in fact" test:

> " The first question is whether plaintiff alleges whether the challenged action has caused him injury in fact, economic or otherwise. There can be no doubt that petitioners have satisfied this test (397 US at 152)."

The *Zlotnick* and *Pizitz* cases apparently draw their conclusions from reading a negative inference into the holding in the Supreme Court's landmark case involving standing in the environmental law area, *Sierra Club v. Morton,* 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 636 (1972.

In this case, Plaintiff's injury was not the traditional economic harm, but was solely aesthetic and conservational injury caused by proposed development of a wilderness area. The Court held, just as it had hinted in dicta in *Data Processing,* that injury of a non-economic nature could be sufficient to meet the "injury in fact" test.

Apparently the *Zlotnick* and *Pizitz* Courts have taken the position that the *Sierra Club* case was restricting allowable injury which could satisfy the "injury in fact" test under NEPA, to aesthetic, conservational, and recreational injuries.

Petitioner submits that nowhere in the *Sierra Club* opinion is there any indication that the Supreme Court was limiting the "injury in fact" test to non-economic injury in the environmental law area. In fact, there is the inference that his

case would not have been before the Court had Plaintiff alleged the traditional economic injury. Several times in the opinion, language appears which leads to the inference that the Court was expanding the doctrine of standing to include non-economic *as well as* economic injuries. For example, at 405 US 738, the Court noted that the trend has been towards recognizing that "Injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language. . .(W)e noted this development with approval in *Data Processing*. . . in saying that the interest alleged to have been injured 'may reflect aesthetic, conservational, and recreational as well as economic values'."

Also, at 405 US 738, the Court made it clear that it was not here restricting the standing test, but broadening it:

> " But broadening the category of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered injury."

Anderson interprets the reasoning of *Zlotnick* and *Pizitz* to be that a Plaintiff may not use economic injury to satisfy the "injury in fact" test while alleging environmental interests to satisfy the "zone of interests" test. However, the *Sierra Club v. Morton* case appears to explicitly rebut this speculation that the same interest must be used to satisfy both prongs of the standing test.

> " Taken together, *Sanders* and *Scripps-Howard* thus established a dual proposition: the fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate (405 US at 737)."

In a recent Supreme Court case dealing with the standing of plaintiffs to sue under NEPA, *U.S. v. Students Challenging Regulatory Agency Procedures, (SCRAP)*, 412 U.S. 669 (1973), the government challenged Plaintiffs' standing to sue under NEPA because plaintiffs alleged, *inter alia*, economic harm. Since plaintiffs had also alleged "environmental interests" as being injured, the Court declined to rule on the issue of whether standing could be met under NEPA by an allegation of economic harm alone:

> " As in *Sierra Club*, it is unnecessary to reach any question concerning the scope of the 'zone of interests' test or its application to his case. It is undisputed that the 'environmental interest' that the appellees seek to protect is within the interests to be protected by NEPA, and it is unnecessary to consider the various allegations of economic harm on which the appellees also relied in their pleadings and which the Government contends are outside the intended purpose of NEPA. (412 U.S. at 686)."

Petitioner respectfully submits that:

(1) The Supreme Court has deferred consideration of this controversy in a recent case raising the issue of whether economic injury is sufficient to confer standing under NEPA, and

(2) One line of cases (*Zlotnick* and *Pizitz*) has interpreted the standing test to preclude economic injury from satisfying the "injury in fact" prong of the standing test, while another line of cases (*National Helium* and *Getty*) have allowed economic injury to meet the "injury in fact" test.

The time has therefore come for the Court to reconcile the standing question definitively in the environmental law area.

These conflicts justify the grant of certiorari to review the judgment below.

3. THE DECISION BELOW IS CLEARLY WRONG AND CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS AS TO THE PROPER INTERPRETATION OF SECTION 102 (2)(C) OF NEPA, 42 USC §4332.

Both the District Court (Maryland) and the Fourth Circuit ruled that Petitioner was incorrectly interpreting NEPA when it argued that an Environmental Impact Statement should be prepared when a proposed federal project will endanger the human environment which will be using the project.

Section 102 (2)(C) of NEPA requires agencies of the Federal Government to include an Environmental Impact Statement in "every recommendation or report or proposals for legislation and other major federal actions significantly affecting the quality of the human environment."

The courts below paraphrased Petitioner's argument to be that NEPA required an Environmental Impact Statement in

situations where the environment would have a significant effect on the major federal project, and held that the statute did not cover such a situation.

Petitioner alleges that the proposed new hospital will significantly affect the quality of the surrounding human environment. This is clear from environmental studies showing likely adverse effects on the hospital's equipment and patients from electronic and radar interference, excessive noise, and the hospital's proposed location in a dangerous sector of the airport's take-off and landing zone. It is clear from numerous cases that NEPA protects not only adverse environmental effects on the surrounding natural environment (such as air and water pollution, razing of forests and parks, etc.), but also protects against adverse effects on the surrounding *human environment.* Examples of cases supporting this proposition are:

McLean Gardens Residents Association v. National Capital Planning Commission, 2 ELR 20659 (D.C.D.C.1972), in which apartment tenants sued to prevent razing of their apartments and adjacent park in favor of an intensive commercial development with luxury high rise apartment units, shopping malls, a hospital, hotel, and condominiums. The alleged attack of the project on the environment was, *inter alia* (along with air and water pollution), the net withdrawal of housing from an already inadequate market, particularly housing which served poor and middle income apartment dwellers and those over sixty. The Court held that Defendants had not complied with NEPA since this was a major federal action "significantly affecting the quality of the human environment."

Businessmen Affected Severely By The Yearly Action Plans, Inc. v. D.C. City Council, 339 F. Supp. 793 (D.C.D.C. 1972) was a case in which property owners, business owners and tenants sued the D.C. Redevelopment Land Agency over a particular redevelopment project, and the Court found that the RLA did not comply with NEPA since its actions would "'significantly affect, (etc.) . . . because replacement of the existing structures within the 5 squares with high rise office building will permanently alter the character of the downtown area, increase pedestrian and vehicular traffic, parking and public transportation needs, all of which will have an impact on the environment."

Hanly v. Kleideinst, 471 F. 2d 823 (2d Cir. 1972) was a

case in which the GSA was erecting a correction center in a city. The agency had only studied the increased sewerage effect of the center on the neighborhood, and the court ruled that it had violated NEPA when it didn't consider the effects, social and psychological, such as possible increased crime rates, which the correction center would have on the surrounding human environment. This case (*Hanly* II) followed the earlier case of *Hanly v. Mitchell,* 460 F. 2d 640 (2d Cir. 1972) which had required the GSA to give attention to other factors that might affect the human development in the area, including the possibility of violation and disturbances in the jail which might expose neighbors to additional noise, the dangers of crime to which neighbors might be exposed as the consequence of having an out-patient treatment center in the building, possible traffic and parking problems," etc. This case was remanded with instructions to make findings concerning the possible increased risk of crime and other factors affecting the human environment.

A similar case is *Tierrasanta Community Council v. Richardson,* 4 ELR 20309 (S.D.Calif. 1973) in which San Diego residents opposed a GSA juvenile detention center in a low density residential area. This Court also found NEPA to have been violated and observed:

> " The ecological effect of the proposed federal youth facility in the Elliott Community is not significant, but the effect of the use of this facility on the human environment in a planned residential area in close proximity to a proposed elementary school site is so significant that an agency decision to the contrary is so questionable as to render it arbitrary and capricious."

Cases such as these make it clear that NEPA protects more than "traditional" ecological concerns such as parks and streams, but also covers the situation where a proposed project will be affecting the surrounding human environment.

The situation in the instant case is one in which the proposed project might significantly affect the quality of the human environment as to those people who will be in the proposed project. The protection of the statute as to the surrounding human environment surely must extend to the human environment which will be inside the project, as well as to that which exists outside of the project. Therefore, an EIS

should have been prepared which took into account the environmental impact of the project upon its prospective clientele.

Contrary to what the lower Courts held, petitioner is not advocating a complete turn-about of the statute, but is arguing for a very small possible extension of it to cover not only the well-recognized situation where the project affects the pre-existing surrounding human environment, but also the situation where the project affects the human environment which will actually be using the project.

However, even given the argument as postured by the District Court and Circuit Court, there is support for petitioner's position in Justice Douglas' opinion in the Ninth Circuit case of *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301 (1974) in which Justice Douglas granted an injunction until NEPA could be complied with in a situation where a proposed major federal action (a dam) was to be placed in a potentially hostile environment (along an earthquake fault line.)

Petitioner respectfully submits that there is both a conflict in Circuits concerning the proper interpretation of NEPA, and that the correctness of the decision below, even assuming the propriety of the statutory test employed, is open to serious question because the facts in the instant case fall within the statutory mandated test of NEPA which requires an EIS to be prepared whenever a proposed federal project will significantly affect the quality of the human environment.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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App. 1

OPINION OF THE COURT OF APPEALS

Issued February 10, 1975

PER CURIAM:

Pleading the National Environmental Policy Act[1], the National Housing Act[2], the Public Health Service Act[3], the Comprehensive Health Planning and Public Health Services Act[4], and the Noise Control Act[5], appellant Clinton Community Hospital, brought this suit in the Maryland Federal District Court in October, 1973 against the Southern Maryland Medical Center, HEW Secretary Weinberger, and HUD Secretary Lynn to enjoin the construction of SMMC's hospital. SMMC is a joint venture of several physicians to construct a 200-bed hospital slightly more than three miles due south of a major runway at Andrews Air Force Base in Prince George's County, Maryland. Appellant is a 33-bed facility located some two miles northwest of SMMC's proposed site.

Stripped to its essentials, appellant's argument is that SMMC's proposed hospital would be adversely affected by its environment, specifically the air base and concomitant air traffic. The District Court granted SMMC's motion to dismiss and *sua sponte* dismissed the case against the Secretaries.

The District Judge correctly held that appellant had no standing to sue. In the fourth paragraph of the appellant's amended complaint it is stated:

> "Plaintiff (appellant) has a pecuniary interest in the outcome of this proceeding, inasmuch as the construction of the SMMC hospital two miles from Plaintiff's existing hospital will result in its eventual closing, since, as a 33 bed hospital, it will be unable to compete with the proposed 200 bed hospital. . . ."

If it has in fact suffered an injury, appellant's economic well being vis-a-vis its competitors is certainly not arguably within the zone of interests to be protected" by the Federal environmental laws. Association of Data Processing Service Organizations, Inc. v. Camp, 397 US 150, 153 (1970).

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[1] 42 USC 4331-4334 (1970).
[2] 12 USC 1715z-7(d) (4) (1970)
[3] 42 USC 291d(a)(1) (1970)
[4] 42 USC 246 (1966)
[5] 42 USC 4901-4917 (1972)

Additionally, as the District Court noted, appellant has failed to state a claim upon which relief can be granted. It contends that injunctive relief is in order because of the impact of the *existing* environment on the *proposed* hospital. Such a claim turns the statutory scheme 180 degrees around. As it is stated, the claim was properly dismissed by the District Court.

For these and the reasons stated by the District Court, we affirm the dismissal of the case. Clinton Community Hospital Corporation v. Southern Maryland Medical Center, et. al., 374 FS 450 (D.Md. 1974).

Affirmed

App. 3

OPINION OF THE DISTRICT COURT

Issued April 16, 1974

The plaintiff Clinton Community Hosptial Corporation (CCH) on October 3, 1973 filed a Complaint for Injunction against Southern Maryland Medical Center (SMMC), allegedly a joint venture consisting of several doctors proposing to organize and construct a new hospital on land owned by the defendant medical center lying some 17,000 feet due south of a major runway serving Andrews Air Force Base in Prince George's County, Maryland.

The Plaintiff hospital, located approximately two miles northwest of defendant's proposed hospital site, brought its suit allegedly to enjoin construction of the new facility "for and on behalf of the proposed employees and consumers of the hospital services" to be provided at the new hospital and medical complex. Jurisdiction was invoked under the provisions of the National Environmental Policy Act (NEPA), particularly 42 U.S.C. §4331(b)(2) and (3), it being the contention of the plaintiff that construction of the new hospital at the site proposed would constitute a risk to health and safety and would have other undesirable and unintended consequences in violation of the spirit and policy of Section 4331 (b)(2) and (3) of the Act.

While the original complaint is prolix and replete with unnecessary evidentiary detail, the eighty-six paragraphs spread over 14 pages when sifted down convey plaintiff's view that departing and landing aircraft would pass directly over the proposed facility endangering the patients and employees in several ways. First, it is claimed that the continuous movement of aircraft presents substantial risk of an air accident involving the crash of planes or large debris. Next, the noise created by the aircraft would be unacceptable to patients of the medical center. Third, radar in the aircraft would adversely affect vital equipment such as pacemakers and X-ray units and the latter could alter the guidance systems of the aircraft. The rich fuel mixture employed by incoming and outgoing airplanes would

result in heavy fumes and jet ash in the air which would also affect the patients and employees using the facility. Finally, the landing lights of approaching aircraft would enter the patients' rooms on the southern side of the proposed building.

Plaintiff further contended that defendant obtained approval of the plans for the new hospital by the Health Advisory Committee for Prince George's County after defendant applied for and received a grant of feasibility from the United States Department of Health, Education and Welfare (HEW) to obtain financing from the Department of Housing and Urban Development (HUD), and that such was granted without an environmental impact statement required by 42 U.S.C. § 4332(c) of every agency of the United States before approving major federal actions which may affect the environment. Plaintiff also alleged that HEW was preparing an impact statement not yet released, that considers only the effect of noise pollution.

On October 30, 1973 defendant filed a motion to dismiss under Rule 12(b)(6) asserting that the National Environmental Policy Act does not create any substantive private right whereunder private individuals or corporations can state a cause of action or claim upon which relief may be granted against other private individuals or corporations.

The Court scheduled a hearing on defendant's motion to dismiss for January 3, 1974. On December 28, 1973 plaintiff filed a Motion for Leave to Amend Complaint in order to join HEW and HUD as parties defendant, and on the same day the Court signed an order granting the motion and permitting such amended complaint to be filed.

Following the hearing on January 3, 1974, the Court on January 10, 1974 signed a further order directing plaintiff by January 18, 1974 to file his amended complaint adding HEW and HUD as defendants and asserting plaintiff's claims against those agencies.

On January 17, 1974 plaintiff filed a 53 page Amended Complaint for Injunction containing this time 194 numbered paragraphs, to which was attached a 21 page "Memorandum of Law Filed in Conjunction with Amended Complaint of Injunction" and appended to these two documents are 128 pages of "exhibits" consisting of magazine articles, letters,

charts, official correspondence and sundry other material apparently designed to lend factual support to the complaint. The authority for the filing of the "exhibits" is by no means clear. Defendant Southern Maryland Medical Center has renewed its Motion to Dismiss and the two federal defendants Caspar Weinberger, Secretary of HEW, and James Lynn, Secretary of HUD, have moved pursuant to Rule 12(f) to strike the Amended Complaint for Injunction, memoranda of law and documents attached thereto as failing to meet the requirements of Rule 8(a).

The Amended Complaint

The amended complaint adopts a notable shift in emphasis in that it does not in terms purport to be brought for the benefit of the employees and patients of the new facility defendant Southern Maryland Medical Center seeks to erect. Instead, it now appears that Plaintiff has a pecuniary interest in the outcome of this proceeding, inasmuch as the construction of the SMMC hospital two miles from plaintiff's existing hospital will result in its eventual closing, since as a 33 bed hospital, it will be unable to compete with the proposed 200 bed hospital proposed by SMMC."

The amended complaint while complaining principally that defendants are engaged or about to engage in acts and practices contrary to the National Environmental Policy Act (42 U.S.C. §4331 et. seq.) and the Noise Control Act of 1972 (42 U.S.C. §§ 4901-4917), invokes the jurisdiction of this Court on the following basis.

Jurisdiction and Venue

3. The action arises under the following Federal Statutes:

A. Sections 101 to 104 of the National Environmental Protection Act (42 USC 4331 to 4334).

B. Section 242(d)(4) of the National Housing Act (12 USC 1715z7(d)(4)).

C. Section 604(a)(1) of the Public Health Service Act (42 USC 291d(a)(1))

D. Comprehensive Health Planning and Public Health Services Act (42 USC 246).

E. Noise Control Act of 1972 (42 USC 4901-4917) as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and cost, the sum of $10,000."

Boiled down, the amended complaint sets out four broad claims for relief.

(1) It alleges that NEPA has been violated first in that HEW instead of preparing an Environmental Impact Statement in connection with the proposed project, has prepared a Marginal Environmental Impact Statement (MEIS) addressed only to the impact that the proposed hospital would have on the land selected by Southern Maryland Medical Center, rather than the effect of the already existing environment on the hospital when constructed. Plaintiff in paragraph 100 likens the subject matter of the MEIS "to an examination of the impact of planting a pansy bed in an artillery shell testing field and limiting the inquiry as to what adverse effect the pansy bed will have on the surrounding grass." Plaintiff secondly alleges that the MEIS "avoids the central issue of whether patients, doctors and staff are part of the environment which government agencies are directed to protect under the National Environmental Policy Act." *id.*

(2) As to the violation of the cited section of the National Housing Act, plaintiff has directly alleged only that the HUD mortgage insurance authorized by the section should not be issued in the absence of a proper environmental impact statement. That allegation states, at best, a violation of the NEPA, not of the Housing Act. However, the Court has assumed that the plaintiff is also alleging violations of the conditions for HUD insurance set out by 12 USC § 1715z-7 itself.

(3) The complaint further alleges that the Comprehensive Health Planning Act, 42 USC 246, has been violated in that the agencies of the State of Maryland operating pursuant to that Act are improperly constituted and have not filed a plan as required by the Act. (These allegations will be discussed in greater detail below.)

(4) The complaint also alleges violations of the Noise Control Act, 42 USC §§4901 et seq., in that HEW has not consulted with the Administrator of the Environmental Protection Agency concerning research on noise control that might affect the SMMC site. HEW is also alleged to have violated the policy guidelines set out in 42 USC §4901(b).

Motion to Dismiss

Preliminarily, the Court noted that only defendant Southern Maryland Medical Center has moved to dismiss for failure to state a claim, pursuant to Rule 12(b)(6), Fed.R.Civ.P. The federal defendants not having filed such a motion, the question arises whether the Court would therefore be precluded from considering any failure on the part of the plaintiff to state a claim against them. *Martin v. Broadcast Music, Inc.*, 248 F.2d 530, at 531 (9th Cir. 1957); *Gutensohn v. Kansas City Southern Rwy. Co.*, 140 F.2d 950 (8th Cir. 1944).

More recently, courts have held that where circumstances warrant, dismissal of the whole complaint on the court's own motion may be proper. *Robins v. Rarback*, 325 F.2d 929 (2nd Cir. 1963); *Sutton v. Hilco Homes Corp.* 283 F.Supp. 492, at 494, fn.2 (E.D. Pa. 1968); 5 *Wright & Miller, Federal Practice and Procedure*, §1357, at 593, fn. 43. As the ninth Circuit noted in *Dodd v. Spokane County, Washington*, 393 F.2d 330, at 334 (1968),

> [T]he court in practical effect invoked on its own motion Rule 12(b)(6), Fed.R.Civ.P. This the court has the right to do if the proper procedural steps were taken and if the determination is correct on the merits.

The court in the latter case held that the procedural steps had not been taken in that the plaintiff had no notice of the proposed action and no opportunity to file even a written argument. See also *Literature Inc. v. Quinn*, 482 F.2d 372 (1st Cir. 1973).

It is this Court's conclusion that those procedural steps have been met, or rendered unnecessary in the instant case. As has been noted, the plaintiff already has been afforded an opportunity to amend its complaint in response to SMMC's first motion to dismiss. That first motion was exhaustively argued at the hearing held on January 3, 1974. Second, the issued raised by SMMC's second motion to dismiss apply equally to the Federal defendants; third, the same issues again have been exhaustively discussed by the plaintiff in a twenty-one page Memorandum of Law, which the Court has treated as an opposition to the SMMC Motion to Dismiss. Consequently this Court feels that the requirements of fairness and judicial efficiency are best served by considering in a single opinion whether plaintiff has stated a claim on which relief may be granted against *any* of the named defendants.

Additionally, the Court notes that the Federal defendants have filed a Motion to Strike the Amended Complaint, its supporting "Exhibits" and the Memorandum of Law, arguing that they are prolix and confusing and in clear violation of Rule 8. The Court agrees with the observation at page 2 in the Memorandum of Points and Authorities filed in support of that motion that as regards the Amended Complaint "From page 7 to page 51 we are confronted with a confusing mixture of legal allegations, statements of opinion, quotations from documents and hearings in no particular order or discernible pattern. All of this clearly violates Rule 8(e)(1)." Even granting, as plaintiff has argued in its Memorandum in Opposition to the Motion to Strike, that a plaintiff "suing in the environmental context is confronted with a rather harsh burden on its ability to demonstrate standing" and as plaintiff in that memorandum himself admits, a need in this case to "allege those facts tending to demonstrate that the NEPA and the Noise Control Act would be equally applicable to a situation where the proposed project would be the object of the adverse environmental factors, rather than the perpetrator or the one that inflicts harm upon the environment", attaining those goals if they were attainable would be aided more by clarity and brevity than by the prolixity evidence in the Amended Complaint. In view of the disposal of the suit on the merits, the Court need not determine how to enforce compliance with Rule 8.

Since the respective positions of the parties on whether a cause of action has been stated have been fully set forth both in the oral argument before the Court on January 3, 1974 and in the memoranda subsequently filed, the Court feels no useful purpose would be served by hearing further argument on the point.

The NEPA Claims

Before addressing the substantive basis of plaintiff's NEPA claim, the Court will consider whether the plaintiff has standing to raise any such claim.

The fundamental tests for standing in such a suit as this were set out by the Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 90 S.Ct. 827 (1970) and *Sierra Club v. Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). The tests are twofold.

First, to maintain an action a plaintiff must show he has sustained actual injury "injury in fact". *Data Processing,* 90 S. Ct. at 829; *Sierra Club,* 92 S. Ct. at 1365. The second requirement is that plaintiff fall within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing,* at 830.

Plaintiff advances what amount to two alternative theories of standing for his NEPA claims. As to one, this Court concludes, he has alleged injury in fact, but does not come within the necessary zone of interest. As to the other, he has not shown injury in fact within the test established by *Sierra Club.*

Plaintiff first asserts standing as a competitor to SMMC. Despite all the references to the environment, it is apparent that plaintiff's real aim is not to improve the quality of life for this and future generations, but rather to prevent the building of a competitive hospital by highlighting the disadvantages of the competitor's site near an existing air base. While showing a real injury, this status is not within the area protected or regulated by NEPA.

In *Zlotnick v. District of Columbia Redevelopment Land*

Agency, 2 ELR 20235 (D.D.C. 1972), Judge Gerhard Gesell dismissed a suit by city property owners to enjoin condemnation of their land for urban revewal. Judge Gesell held they could not compel the prepartion of a more adequate impact statement, because their object really was the protection of their own financial interests. Judge Gesell in the course of his opinion stated:

> It is not enough that an inadequate environmental impact statement may have been filed for these very preliminary stages of a much larger project that will take years to complete. To have standing grounded on a federal statute plaintiffs must assert an interest 'arguable within the zone of interests to be protected or regulated by the statute . . . in question.' *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 153 (1970); *Blackhawk Heating and Plumbing Co. v. Driver*, 433 F.2d 1137, 1140 (D.C. Cir. 1970). Plaintiffs can at best claim only a remote, insubstantial, highly speculative and ephemeral interest in the environment. They have nothing but their own financial interest to protect as their continuing efforts to achieve financial settlement emphasize. Obviously they would abandon their environment concerns in a moment if the price were right.

Similarly in *Pizits v. Volpe*, businessmen sought to attack an impact statement for a parkway overpass project as inadequate[1] Although the District Court did consider the sufficiency of the impact statement and held it in compliance with all NEPA standards, it did characterize the suit as a "spurious" NEPA case in language which this Court feels would aptly describe the present suit:

> The Court has characterized plaintiff's case as 'spurious' because, as the pleadings reflect, plaintiff's primary concern in filing and prosecuting this litigation was to avert a threatened loss of business. The environmental aspects of the case were brought in only to maintain the action. Of course, the National

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[1]2ELR 20378 (M.D. Ala. 1972), aff'd, 467 F.2d 208, 2ELR 20379 (5th Cir. 1972).

> Environmental Policy Act was not designed to prevent loss of profits, but was intended only to promote governmental awareness of environmental problems.

Plaintiff has no standing under NEPA as a competitor to SMMC.

A second ground for plaintiff's NEPA claim apparently is that as a hospital it too enjoys the environment, and like any other "consumer" of the environment may seek to prevent harm to it. While plaintiff does not claim economic harm from any lost enjoyment of the environment, the Supreme Court has made clear that injury to "esthetic and environmental well-being" may also amount to injury in fact. *Sierra Club, supra,* at 1366.

The question then is whether a corporation such as the plaintiff can be said to have any "aesthetic" sensitivity. The *Sierra Club* case held that even a club with avowed environmental concerns could not sue in its own name if it could not allege any particularized injury. 92 S.Ct. at 1368.

Although conceding that the Sierra Club has a long standing "special interest" in the environment, the Court felt nonetheless that no injury in fact was shown. A fortiori, the plaintiff in the case at bar—who has not alleged any previous commitment to conservation—cannot show any harm accruing to it from potential damage to environment.[2]

Approaching the question in another way, the argument certainly could be made that corporations are *per se,* incapable of suffering "aesthetic" injury. Here one may draw an analogy from the law of privacy. It is clear that corporations do not enjoy the right to privacy. In *U.S. v. Morton Salt Co.*, 338 U.S. 632, at 652; 70 S.Ct. 357, at 368 (1950), the Supreme Court

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[2]The Supreme Court further specifically distinguished and approved its earlier holding that clubs do have standing to sue for injuries to their members. See NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); see also Ward v. Ackroyd, 344 F.Supp. 1202 (D.Md. 1972); National Association for Community Development v. Hodgson, 356 F.Supp. 1399 (D.D.C. 1973). Those rulings are of no help to this plaintiff who has not alleged injury to any members, and who has not joined any shareholders or officers, cf. First National Bank of Homestead v. Watson, 363 F. Supp. 466 (D.D.C. 1973).

ruled that Corporations could not resist an FTC subpoena on invasion of privacy grounds, saying,

> [C]orporations can claim no equality with individuals in the enjoyment of a right to privacy. [Citation omitted.]. They are endowed with public attributes. They have a collective impact upon society from which they derive the privilege of acting as artificial entities.

In *Hale v. Henkel,* 201 U.S. 43, at 78; 26 S.Ct. 370, at 380 (1906), Justice Harlan concurring, said,

> In my opinion, a corporation—'an artificial being, invisible, intangible, and existing only in contemplation of law'—cannot claim the immunity given by the 4th Amendment; for it is not of the 'people' within the meaning of that Amendment.

Again, 62 Am. Jur. 2d Privacy § 11, at 692 reads,

> Since the right of privacy is primarily designed to protect the feelings and sensibilities of human beings rather than to safeguard property, business, or other pecuniary interests, the courts have denied this right to corporations and other institutions.

While, obviously, some of the concerns that prompted the denial to corporations of the right of privacy are not relevant to their enjoyment of the environment, it is clear that the statement of policy in Section 101 of NEPA, 42 USC § 4331, especially Subsection (c) ("each person should enjoy a healthful environment . . .") is directed at the feelings and sensibilities of human beings, and not to "artificial entities".

Accordingly, this Court concludes that plaintiff cannot as a corporation assert an injury to its esthetic enjoyment of the environment.

While the conclusion that plaintiff is without standing to raise NEPA claims disposes of the issue, the Court also notes that the claims lack substantitive basis.

Plaintiff's argument that an environmental impact statement must examine the effects of Andrews Air Force Base on the SMMC might have point if Plaintiff had built its hospital on the

land now owned by SMMC and the United States had then sought to build the Air Base where it is now located. The plaintiff might have a claim under NEPA that the effect of the project (i.e., the Air Base) on the existing environment (including its hospital) would call for an environmental impact study. In the present case, however, the *project is the proposed competitive hospital,* and in the Court's view, under NEPA the involved agencies must consider the effect of the hospital building on the surrounding environment, *not* the effect of the environment on the hospital.

Additionally, plaintiff argues that "the people who will be patients, will be working and will be visiting the hospital are themselves a part of the environment and are entitled to those considerations to which the NEPA was directed."[3] If this is the closest the plaintiff can come to a legitimate environmental concern, in the Court's view it is clearly beyond the zone of interests which NEPA protects.

No support can be found, in the text of NEPA, in its legislative history, or in the cases construing it, for this extraordinary and bizarre proposition. The term "environment" is not defined in the Act, but there are indications that it does not include human beings. For example, Section 101(b)(2), 42 USC § 4331(b)(2) envisions as one of the ends of the national policy, to

> assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing *surroundings.* [Emphasis added.]

It would be an egregious and unwarranted extension of the scope of NEPA to require that any "major Federal action" which would affect people–thus encompassing virtually every government program–be suspended until an environmental impact statement is prepared. To state the proposition is to show its absurdity.

The Court concludes, therefore, that plaintiff has failed to state a claim upon which relief can be granted under NEPA and

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[3] Plaintiff's "Memorandum in Opposition to Federal Defendant's Motion to Strike", p. 3.

that the 194 paragraphs and 53 pages of the amended complaint mount up only to a spurious NEPA suit.

The Claims under the National Housing Act, 12 USC § 1715z-7

The section of the Act cited by the plaintiff permits the Secretary of HUD to grant mortgage insurance to nonprofit hospitals, provided certain conditions are met. It appears that plaintiff's asserted claims under this Act are in large measure claims under NEPA. To that extent, they have already been discussed; to the extent they assert other grounds they are prematurely presented.

Plaintiff does not allege that any mortgage insurance has yet been authorized or granted. Paragraphs 4, 5, 6, 94 and 95 of the Amended Complaint. Should such insurance be granted, it is conceivable that plaintiff might have a cause of action, as a competitor to the recipient, under the doctrine of *Data Processing, supra,* and under the provisions of § 10(a) of the Administrative Procedure Act,5 USC § 702. However, review of agency action under that Act is authorized only when the action is final. 5 USC § 704.

> The problem [of finality or ripeness] is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial discretion and the hardship to the parties of withholding court consideration.

Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, at 1515, 18 L.Ed.2d 681 (1967).

In this case, delay will work no hardship on the plaintiff. If HUD insurance is vital to SMMC, construction will not be completed without it; if the insurance is not vital, then CCH accomplishes nothing more by blocking the HUD insurance now than at a later time.

More importantly, it is clear that the issues posed by plaintiff's allegations are not sufficiently concrete to permit review, since HUD has made no decision whatever. See *Hanley*

v. Volpe, 305 F. Supp. 977 (E.D. Wis. 1969)[4]

Plaintiff also lists 42 USC § 291 d(a)(1) as a source of its claims, but none of the allegations of the amended complaint involve that statute.[5] Since 12 USC § 1715z-7(4) refers to this section of Title 42, this Court has assumed that the claimed violation relates only to the HUD claim.

This Court concludes that challenge to the HUD mortgage insurance is premature, and should therefore be dismissed. Should HUD eventually make a determination adverse to plaintiff, that will be the time for plaintiff to consider whether an action can be brought for review.

Claims under the Comprehensive Health Planning Act 42 USC § 246

Plaintiff's allegations under this Act require considerable discussion.

42 USC § 246(a) authorizes the Secretary of HEW to grant funds to the states for comprehensive health planning, provided certain conditions are met. One such condition is that the state designate an agency to receive the funds, § 246(a)(1); under Article 41, Section 59C, Annot. Code of Md., an agency titled the Comprehensive Health Planning Agency (CHPA) is so designated.

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[4]Plaintiff alleges that, under a "Memorandum of Agreement" HEW makes determinations of approvability, and that HUD "as a practical matter . . . under normal circumstances accepts HEW's review and recommendations as the basis for FHA approval." Amended Complaint, paragraph 18. Plaintiff also alleges that HEW has granted SMMC "feasibility . . . approximately nine months ago". Amended complaint, paragraph 95. This Court does not consider that these allegations create finality at this stage, since HUD approval while possible and perhaps even probable, is not inevitable.

[5]There is a possibility that plaintiff has made assertions meant to apply equally to 42 USC §291d(a)(1) and 42 USC §246. If that is the case, then the discussion below of 42 USC §246 also applies to the claims under 42 USC §291d.

Article 43, Section 559 Annot. Code of Md. authorizes the Secretary of the State's Department of Health and Mental Hygiene to license hospitals. Subsection (a-10) of that section directs that no license be granted

> unless the hospital . . . conforms to or is not inconsistent with the comprehensive health plan developed and applicable for the particular area. Where no comprehensive health plan has been developed for a particular area, the State's comprehensive health planning agency shall make the determinations required. This reference is to the comprehensive health plan developed and effective under § 59C of Article 41 of this Code.

The subsection also states:

> . . .the Prince George's County health planning advisory committee shall be deemed the interim regional health facilities planning agency for Prince George's County pending designation of a permanent planning agency for any region that shall include Prince George's County.

Plaintiff alleges that the CHPA adopted a plan in 1970, against which the SMMC and CCH proposals (to build and to extend, respectively) were apparently to be measured. Paragraphs 44-54, Amended Complaint.

The County Health Planning Advisory Committee (HPAC) recommended on March 10, 1971 that plaintiff's application for a hospital expansion be denied; on March 29, 1971, the CHPA endorsed that recommendation. On November 1, 1972, A Board of Review of the Department of Health and Mental Hygiene also endorsed those recommendations. Paragraphs 69, 70 and 75 of the Amended Complaint. The Secretary then denied plaintiff a Certificate of Necessity. Paragraph 91. At about the same time, apparently, SMMC's application was approved by the same bodies. Paragraphs 89, 90, 91 and 93.

Plaintiff alleges that the actions of HPAC and CHPA and the Board were improper, for reasons which by generous inference from the Amended Complaint and plaintiff's Memorandum of Law appear to be:

(1) that the 1970 Plan was disregarded;

(2) that the 1970 Plan was not a Plan as required by law;

(3) that the members and personnel of the HPAC and CHPA were incompetent, biased or both.

These allegations appear to imply three legal claims:

(A) that the actions violated state statutes;

(B) that the actions, insofar as they led to final decisions on licensing both SMMC and CCH, violated 42 USC § 246;

(c) That the actions, as part of the process leading to HUD Mortgage insurance for SMMC violate 12 USC § 1715z-7.

The first claim does not by itself state a claim cognizable in federal court, as no federal right is asserted. 28 USC § 1331. Plaintiff's resort to the state courts (Paragraphs 73-77) indicates its recognition of that conclusion.

The second cause of action is more troublesome. CHPA is apparently federally funded; if plaintiff were within the zone of interest of the Act, and if it were injured *directly* by an action of that agency, it may be that it would be able to maintain an action in this Court. *New York City Coalition for Community Health v. Lindsay*, 362 F.Supp. 434 (S.D.N.Y. 1973). But neither condition is met in this instance.

If the CHPA acted improperly, it was in violation of both federal and state law. Furthermore, its recommendations were but one step toward the final action of the Secretary of Health and Mental Hygiene. If the Secretary or the Board of Review acted improperly, they were in violation only of state law, since they are neither funded by nor responsible to the federal government.[6] Consequently, the alleged violation of a federal statute is but a minor portion of plaintiff's grievance.

For that reason, plaintiff has not stated a federal claim within the jurisdiction of this Court.

> A mere incidental or collateral federal question may appear or may lurk in the background of the record, but this is not a sufficient or adequate basis upon

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[6] The Secretary's actions may also be part of the procedure leading to the HUD mortgage insurance. In that character, they are not final actions reviewable by this Court; see pages 13-14 supra.

which federal jurisdiction may attach.

> *Screven County v. Brier Creek Hunting and Fishing Club*, 202 F.2d 369, at 370 (5th Cir. 1953)

See also *Burgess v. Charlottesville Savings & Loan Assoc.*, 477 F.2d 40, at 44 (4th Cir. 1973).

Another description of the same doctrine is

> that when the controversy between the parties may be decided under local law without the necessity of interpreting a federal statute, there is no federal jurisdiction.
>
> *Cabana Management Inc. v. Hyatt Corp.*, 441 F.2d 862, 864 (5th Cir. 1971)

See generally *Gully v. First National Bank*, 299 U.S. 109, 57 S. Ct. 96, 81 L.Ed. 70 (1936); *Hines v. Cenla Community Action Committee*, 474 F.2d 1052 (5th Cir. 1973).

Furthermore, it is doubtful whether plaintiff has standing in these circumstances to challenge the actions or make-up of the CHPA. The primary purpose of the agency under the federal act is to improve the health planning of the state. It is not at all clear that a hospital affected by an action of CHPA pursuant to a wholly separate state statute (Article 43, Section 559) can be held to be within the zone of interest of the federal act under the rule of *Data Processing*. See *Hines, supra*, at 1056; cf. *Gomez v. Board of State Employment Services*, 417 F.2d 569 (5th Cir. 1969).

The third claim, as the Court has already described, is not yet ripe for judicial review. The extent to which CHPA's recommendation (even if improperly arrived at) may or may not have contributed to a HUD action adverse to plaintiff can only be determined when such action is final.

Claims under the Noise Control Act, 42 USC §§ 4901 et seq.

Plaintiff has cited 42 USC § 4903 (c)(2) as the source of its claim, Amended Complaint, Paragraph 22, and alleges that the section has been violated in that HEW has not consulted with

the Environmental Protection Agency concerning the noise in the environment of the SMMC, and in that HEW "has failed to carry out its programs as it relates to the SMMC project in a manner consistent with the policy declared in Title 42, Section 4901(b)." Paragraphs 166 and 167, This Court concludes that the plaintiff lacks standing to bring such an action, for the reasons advanced at the outset of this memorandum in the discussion of standing under NEPA.

It is true that 42 USC § 4911(a) authorizes suits by private citizens to remedy the "violation of any noise control requirement". However, as defined in Subsection (f) of the same section, a "requirement" is created by regulations promulgated by the Environmental Protection Agency or Federal Aviation Agency. Plaintiff has alleged the existence of no relevant regulation, and has therefore not stated a claim for which relief can be granted. See, e. g., *Burton* v. *Peartree*, 326 F.Supp. 755, at 761 (E.D. Pa. 1971); *Cross v. Board of Supervisors of San Mateo County*, 326 F. Supp. 634 (N.D. Cal. 1968), affirmed 442 F.2d 362 (9th Cir. 1971).

Conclusion

For all the foregoing reasons, this Court will grant the Motion to Dismiss filed by the Southern Maryland Medical Center, and will on its own motion order the dismissal of the action as to defendants Weinberger and Lynn. An order giving effect to this ruling is attached to this Memorandum.

(Signed) Herbert L. Murray
United States District Judge

Dated April 16, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CLINTON COMMUNITY HOSPITAL CORPORATION ▪

v. ▪ Civil No. 73-981-HM

SOUTHERN MARYLAND MEDICAL CENTER et. al. ▪

ORDER

For the reasons stated in the Court's Memorandum filed this date, it is this 16th day of April, 1974, by the United States District Court for the District of Maryland, hereby

ORDERED that the Motion to Dismiss Amended Complaint for Injunction filed by defendant Southern Maryland Medical Center be, and the same hereby is, Granted, and it is further

ORDERED that plaintiff's Amended Complaint for Injunction as against all of the defendants be, and the same hereby is, Dismissed Without Leave to Amend, with costs to defendants.

(Signed) Herbert L. Murray
United States District Judge